United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

75-1256

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FOR THE SECOND CIRCUIT

Docket No. 75-1256

UNITED STATES OF AMERICA,

Appellee,

—v.—

MARTIN SCHWARTZ,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

APPELLANT'S BRIEF

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Preliminary Statement

Martin Schwartz, an attorney, appeals from a judgment of conviction entered against him on June 6, 1975, after a jury trial before the Honorable Thomas P. Griesa, D.J., in the United States District Court for the Southern District of New York (A. 465).[1]

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[1] References to the Appellant's Appendix are preceded by "A. "; references to the trial transcript are preceded by "Tr. ". Government exhibits are preceded by "GX". Where an exhibit is reproduced in the Appendix, its designation is immediately followed by an Appendix reference.

In early November, 1973, the defendant was given a Jackson Pollock painting, entitled "Cruxifixion" in payment of legal fees owed to him by a client, Peter Wertz. Wertz had purchased the painting from the Maxwell Galleries of California in early September. During the last week of November, 1973, the defendant pledged the Pollock painting as security for a loan with the First National City Bank. The painting was returned to the defendant by the Bank on February 2, 1974. On February 12, 1974, undercover agents of the F.B.I. engaged in negotiations with the defendant to purchase the painting. When the defendant indicated a willingness to sell it, he was arrested.

Thereafter, the defendant was charged in four counts of a fifteen count indictment which was filed against him and his client, Wertz. The remaining counts named only Wertz as a defendant. At the time of trial, Wertz was a fugitive and the defendant was tried alone.

Counts 2 and 3 (A. 5-7) charged two separate uses of the mails for the purpose of executing a scheme to defraud Maxwell Galleries (18 U.S.C. § 1341 and § 2).

Count 9 (A. 8-9) charged that on November 28, 1973, the defendant pledged the Pollock painting for a bank loan, "knowing the same to have been unlawfully converted and taken as set forth in Counts one through three herein" in violation of 18 U.S.C. § 2315 and § 2.

Count 10 (A. 9) charged that from September 6, 1973, up to and including February 12, 1974, the defendant

did receive, conceal, store, sell and dispose of the painting, "knowing the same to have been unlawfully converted and taken as set forth in Counts one through three herein", in violation of 18 U.S.C. § 2315 and § 2.

The trial commenced on April 14, 1975 and ended with a jury verdict on April 26, 1975. After two days of deliberation, the jury found the defendant guilty upon each of the four above noted counts. On June 6, 1975, the District Court sentenced him to a term of two years imprisonment upon each count, to be served concurrently (A. 465). He has been continued on bail pending the hearing and determination of this appeal.

Questions Presented for Review

1. Did the government fail to establish that Wertz had secured title to the painting by means of a scheme to defraud within the meaning of 18 U.S.C. § 1341?

2. Did the government fail to establish that the defendant Schwartz knowingly was a party to such a fraudulent scheme?

3. Did the government fail to establish that the defendant Schwartz received and pledged the Pollock painting knowing it to have been unlawfully converted by Wertz?

4. Was the defendant Schwartz a good faith purchaser within the meaning of the New York Uniform Commercial Code, thus rendering insignificant any indication of fraud or nonpayment which may have come to his attention after the transfer of the painting to him?

Statement of Facts

A. The Relationship Between the Defendant Schwartz and Antique Investors, Inc.

The defendant Schwartz is an attorney. Throughout the time relevant to this case he was engaged in the general practice of law with offices at the Pan American Building in Manhattan. He is not an art collector, and, until the events of this case, he had never represented anyone in the art business (Tr. 961-4).

In September, 1972, an accountant by the name of Bernard Howard had a client whom he introduced to the defendant as Peter Wertz.[2] Wertz was the controlling shareholder and sole operating officer of a business called Antique Investors, Inc. [hereinafter, "Antique"], which was engaged in the purchase and sale of works of art. Antique had been formed and was in operation before the defendant's acquaintance with Wertz, and the defendant has never been a shareholder of the company (Tr. 966).

Wertz resided in an elaborate modern mansion in Peekskill, New York. The mansion had formerly been owned by

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[2] As will hereinafter be shown, Wertz's true name was Harold Von Maker. Von Maker had secured the permission of someone by the name of Peter Wertz to use that name (A. 193-8). It appears that Von Maker's motivation in not using his true name stemmed from a desire to avoid the consequences of his prior life, which included a criminal conviction. As will hereinafter be shown, neither the use of a false name nor Von Maker's disreputable background was known to the defendant until well into the events of this case. So as to avoid confusion, Von Maker will hereinafter be referred to solely as "Peter Wertz", since that is the name by which the trial witnesses knew him during most of these events.

the entertainer, Jackie Gleason, and had a value of $850,000. It was mortgaged only to the extent of $200,000. (A. 191; Tr. 293, 410, 526-7, 888-90, 989; GX 47-54-A. 270-290).

The accountant Howard brought Wertz to the defendant so that Wertz could retain the defendant to represent him and Antique in future legal transactions relating to the sale of works of art. It was agreed that the defendant would be retained at the rate of $1000. per month plus additional charges as warranted (Tr. 964-5).

Just before Wertz retained the defendant Schwartz, Wertz entered into a business relationship with another attorney, Theodore Delson. Delson was a wealthy art collector who, during the period in question, advanced loans to Antique for the acquisition of art and also contributed a number of his own paintings to the Antique venture. The value of that portion of the Antique collection in which Delson shared an interest amounted to approximately $1,800,000 (Tr. 271-2).

It can thus be seen that the Wertz/Antique image depicted to the defendant at the outset of this retainer and during the ensuing period was that of a very substantial and sophisticated art operation. Indeed, as the defendant came to learn during the summer and fall of 1973, the Antique collection of art had an actual sale value of approximately $3.5 million (See: GX 118-A. 298-316, GX 190-A. 348-359; Tr. 889-90).

There is no evidence that the defendant Schwartz had anything whatsoever to do with the purchase of art by

Antique or with the prices, income tax returns, or bookkeeping of Antique, and the defendant, who testified in his own behalf, denied such involvement (Tr. 967).

B. Events Leading to the Defendant's Ownership of the Pollock Painting.

1. The Salads of America Venture.

The defendant had known an attorney, Irving Miniberg, since 1969. Miniberg was a member of the Washington, D. C. and Virginia Bars (Tr. 383, 393).

During the two year period prior to January, 1973, Miniberg had conducted feasibility studies with regard to a project for the growing of salad vegetables in the Dominican Republic for exportation. He formed a corporation, called "Salads of America" in January, 1973, and commenced attempting to accumulate capital for the project (Tr. 383-4). In mid-1973, Miniberg broached the project with Schwartz and pursuaded Schwartz to organize an investors group to purchase a thirty percent interest in the Company for $100,000. On July 28, 1973, Schwartz committed himself to raise the funds in question over a ninety day period beginning in the late summer or early fall of 1973. It was concurrently agreed that efforts would be made to raise capital by means of loans from sources in the Dominican Republic and from banking sources in the United States, with the goal of utilizing such loans for the purpose of re-paying the capital provided by the investors (Tr. 383-7, 401-4; GX 150-A. 344).

There is no claim or indication in this record

that the Salads of America venture was anything other than the legal business project which it purported to be. It formed, however, a central, albeit questionable, aspect of the government's proof. It appears to have been the government's contention that the defendant's desire to raise funds for that venture provided a motive for him to engage in illegal conduct with respect to the Pollock painting.

2. The Wertz Investment (August 6, 1973).

In accordance with his commitment to attempt to raise $100,000 for Salads of America, the defendant broached the project to Wertz, and after an examination of the project portfolio, Wertz agreed to participate to the extent of $50,000 (Tr. 985). Although Wertz was possessed of the substantial assets noted supra, he was then in a bad cash position. Wertz was able to arrange a $100,000 loan, through his accountant, from an organization called K.R.R. Associates. The facts concerning that loan were the subject of the trial testimony of David Kule, a principal in K.R.R. Associates (Tr. 288, et seq.).

So as to take advantage of corporate interest rates, Kule required that notes in the amount of $120,000 be made payable from Antique to Wertz, who then discounted them to Kule's firm for the requested $100,000. The notes were payable at the rate of $4,000. per week over the following six months, and were to be secured by a mortgage on the Jackie Gleason mansion, owned by Antique, and by an ostensibly valuable

painting, also owned by Antique.

The closing on this loan was scheduled to and did occur on August 6, 1973, with the defendant Schwartz representing Wertz. At the closing, Kule prevailed upon Schwartz to guarantee the security, i.e., the validity of the second mortgage and the authenticity of the painting. Schwartz did so.[3]

Fifty thousand dollars of the $100,000 loan was utilized to pay for Wertz's investment in Salads of America. $46,800 of the loan went to Antique. The balance of the loan was utilized to pay for fees and expenses (Tr. 991-2).

The first three $4,000 notes were timely paid; the next three notes did not clear, but were paid through the intercession of Schwartz, who was contacted by Kule. Similarly, through the intercession of Schwartz, the eighth note was paid to the extent of $2400 shortly after October 10, 1973. Thereafter, no further payments were made (Tr. 289-320; GX 47-55-A. 270-290).

3. The Defendant's Discovery that Wertz was Harold Von Maker.

On October 5, 1973, under circumstances unrelated to any of the other events in this case, an F.B.I. Agent, Donald L. Mason, was conducting an inquiry concerning Wertz's dealings with the Chelsea Bank in New York. In this connection, he advised the president of the Bank and the defendant Schwartz

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[3] The closing documents are GX 47-54, which are reproduced at A. 270-290. The painting in question was not the Jackson Pollock nor was it obtained from Maxwell Galleries.

that Wertz's true name was Harold Von Maker and that "Mr. Von Maker had a reputation of being a confidence man in the art world and furthermore that he had an arrest record." (Tr. 711). According to Mason, the defendant Schwartz was visibly shaken by this revelation. According to Schwartz, he immediately confronted Wertz with what he had learned, and Wertz started to cry: "He said he was in the art business and he didn't want people to know who he was. Now he was rehabilitated, he ran a legitimate art business and he wanted to get a fresh start.... I was satisfied with his explanation at that point. I felt the man had a right to rehabilitate himself." (Tr. 1018, 1020).

4. The Transfer of the Pollock Painting to the Defendant in payment of Legal Services Rendered; Commencement of Negotiations with the Allbrite Group.

The defendant testified at trial, without contradiction, that there came a time in mid-October, 1973, when he had fulfilled only $17,800 of his own $50,000 commitment to the Salads of America project. In that connection, he confronted Wertz with the fact that Antique was indebted to tne defendant to the extent of over $35,000 for legal services that had been rendered since the inception of the retainer agreement. Wertz responded that he did not have funds available for the payment of the fee, and prevailed upon the defendant to accept a painting in payment of the debt. It was agreed that if the defendant sold the painting or obtained a loan utilizing it as security, any excess over the fees owed would be credited against future legal fees. The painting in question

was entitled "Crucifixion" by Jackson Pollock (Tr. 1010-11).

In late October, 1974, the defendant was acquainted with one Edward Loughran, with whom he had had business dealings unrealted to the events of this case. Loughran testified as a government witness at the trial (Tr. 453 et seq.). Loughran had repeatedly pledged stolen bonds for bank loans, had been apprehended by federal authorities, and had commenced service as a government informant in September, 1973. Loughran unequivocally testified that the defendant had no knowledge of these facts (Tr. 459-73; 537-546). As of the time of Loughran's testimony, he was scheduled to be sentenced with respect to a plea of guilty upon a charge of conspiracy to traffic in stolen securities. Other charges against him had been dropped in consideration for his cooperation with the government (Tr. 465; 545-6).

Coincidentally, and not in the company of the defendant, Loughran became acquainted with Wertz in mid-1973. At the time, Loughran was visiting the Chelsea Bank in Manhattan in connection with one of his loan transactions. Wertz was conducting an art exhibit at the Bank, and the bank president introduced the two men to each other (Tr. 460-1).

During the course of a conversation with Loughran, in late October, the defendant mentioned his interest in obtaining a bank loan for the purpose of fulfilling his own Salads of America commitment. He indicated that he would be able to put up a valuable painting as security for such a loan. He also indicated that Wertz was looking for a buyer

for the entire Antique collection. Loughran said he would see what he could do (Tr. 476-80).

On November 2, 1973, pursuant to Wertz's mid-October offer, the defendant received the Pollock painting from Wertz, together with a bill of sale in consideration of prior legal services (Tr. 1010-1011; 1022-1026; GX 217-A. 363).

C. The Defendant's Course of Dealings to the Point of his Arrest.

1. The Pledging of the Pollock Painting with the First National City Bank.

At or about the time of his conversation with Loughran (supra, p.10), the defendant independently mentioned his desire for a loan to another acquaintance, Leon Bonder (Tr. 1282 et seq.). In early November, Bonder introduced the defendant to the loan department of the First National City Bank in Central Valley, New York (Tr. 358-9). As a result, on November 28, 1973, that bank granted a $75,000 loan to the defendant, and took the Jackson Pollock painting into possession as collateral (Tr. 359-365; GX 84-87-A. 291-294).

2. The Defendant's First Knowledge of Maxwell Galleries and his Conversations with Hoffman.

Loughran never did secure a loan for the defendant. However, Loughran's effort to obtain the loan and to find a purchaser for Wertz's collection, resulted in the revelation that the Pollock painting had not been paid for. There is a conflict in the testimony as to when that fact came to the

defendant's knowledge.

Loughran sought to place the loan and sell the Antique collection through Howard Allbrite, a Chicago mortgage broker (Tr. 479-487; 498-9).[4] Loughran's trial testimony was that Allbrite retained the services of a noted art dealer and appraiser, Donald Richards, and that Richards uncovered the Maxwell Galleries' claim to the painting toward the end of November, 1973. He further claimed that on November 26 or 27 he told Schwartz that Allbrite would not be able to obtain a loan secured by the Pollock painting since the painting had come from Maxwell Galleries in San Francisco and had not been paid for (Tr. 490-1). It must be emphasized that even if Loughran's testimony were believed with regard to the date upon which he transmitted this information to Schwartz, there is no claim by Loughran that he, himself, was aware or that he told the defendant that the Maxwell Galleries was claiming any fraud in the purchase of the painting.

At the trial, the defendant called the appraiser, Richards, as a witness. In contract to Loughran's testimony, Richards testified that he contacted the Maxwell Galleries for the first time "a few days" after December 11, 1973 (Tr. 890-1).[5] It was then that he learned that the Gallery had not

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[4] Allbrite was not called as a witness at trial.

[5] He spoke to the owner, Marcus Hoffman. Hoffman recalls this conversation as being in late November or early December (A. 134-5). Circumstantially, it must have been after December 7, 1973, since on that day Hoffman wrote to Wertz and made no mention of having learned that Wertz had sold or was attempting to sell the painting (GX 24-A. 257).

been paid for the painting, and he transmitted this information to Allbrite in mid-December (Tr. 890-1; 895-6; 943). Again, with respect to Richards' testimony, there is no claim that Maxwell Galleries told him or that he told anyone else, at any time, that the painting had been purchased by means of fraudulent representations.[6]

The defendant's testimony is that the information concerning the non-payment claim of Maxwell Galleries was not communicated to him by Loughran or by anyone else until January, 1974. He then immediately confronted Wertz with this information and Wertz acknowledged that he had not yet paid for the Pollock painting, but asserted that he had, in fact, purchased it and was the owner. He said that he intended to pay for the painting out of the proceeds of the sale of the remainder of the Antique collection (Tr. 1031-3).[7]

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[6] Both with respect to Loughran's testimony and Richards' testimony, our use of the term "fraudulent representations" encompasses both the lack of either a bare claim of fraud or the substance of communications by Wertz to the Gallery constituting mis-statements of fact.

[7] According to the defendant, Wertz also admitted having shown the defendant a spurious bill of sale from one Sloane to Antique, but Wertz explained that he simply did not wish to reveal the sources of his paintings (Tr. 1032). At the time of the above noted confrontation, Wertz showed Exhibits 12 and 18 to the defendant, those being the bills of sale for the three paintings which Wertz had acquired from Maxwell Galleries (Tr. 1034). Not content with Wertz's interpretation of the legal effect of his transaction with Maxwell Galleries, the defendant researched the Uniform Commercial Code, and reached the conclusion that the bills of sale represented a true sale to Antique Investors, and were not encumbered by a security interest (Tr. 1033-5).

The evidence clearly establishes that Wertz intended to pay for the painting out of the proceeds of the sale of the Antique collection. See: the testimony of Wertz's assistant, Thomas Bayne, (A. 232-3), as well as that of Loughran (Tr. 569-70), both of whom testified as government witnesses. See also: GX 130-A. 322.

By all accounts, the defendant's first communication from Maxwell Galleries was on January 21, 1974. Having learned that the defendant was Wertz's attorney, the proprietor of Maxwell Galleries, Marcus Hoffman, called the defendant from San Francisco and told him that he wanted the painting back and was coming to New York for that purpose. The defendant suggested that when Hoffman arrived in New York he should come to the defendant's office to discuss the matter (A. 156-7).

Hoffman came to New York on January 22, 1974 and remained until January 24, 1974. He also caused a telegram to be sent to Wertz on January 23, 1974, stating: "Howard Allbrite has full authority to act as agent in my behalf for the Jackson Pollock, T.H. Benton and Marie Cassatt owned by Maxwell Galleries." (GX 33-A. 266).

On January 24, Hoffman and Schwartz met at Schwartz's office in Manhattan. During that meeting, Schwartz revealed that Wertz had given him the Pollock painting in payment of legal fees and that Schwartz had pledged the Pollock painting as security for a loan with the First National City Bank in Central Valley, New York. Schwartz clearly asserted

ownership of the painting, but suggested that he would attempt to resolve the matter for Hoffman (A. 157-9).

A careful examination of Hoffman's testimony at the instant trial reveals that he only told the defendant that the painting had not been paid for. Moreover, it was Hoffman's admission at trial that he was willing to take payment instead of the painting (A. 152-3). Nowhere in Hoffman's testimony does he claim that he told the defendant that he had been defrauded out of the painting. More specifically, Hoffman does not claim to have complained to the defendant that Wertz had used a false name or that Wertz had indicated that he was purchasing the Pollock painting for his own collection and not for resale or that payment had been due within thirty days or that Wertz had sent him post-dated checks which had not cleared the account. Similarly, Hoffman does not claim that he showed or described to the defendant any of the correspondence between the Gallery and Wertz. In short, Hoffman's stance was merely that of a creditor.

3. The Return of the Pollock Painting to the Defendant by First National City Bank; the Attempted Sale and the Defendant's Arrest.

By January 31, 1974, Hoffman ascertained the name of the bank at which the Pollock painting had been pledged by the defendant. He sent a telegram to that bank, designating Allbrite as his agent to secure the return of the painting as to which he maintained ownership (GX 34-A. 267).

On February 4, 1974, due to Hoffman's telegram,

the bank returned the painting to Schwartz (Tr. 366-7, 1043-4). On February 5, 1974, a Mr. Greene appeared at the defendant's office for the purpose of securing the Pollock painting from the defendant. The defendant refused to give it to him (Gx 35-A. 268, GX 36-A. 269; A. 161-2).

At about the same time, the defendant allegedly discussed the bank's return of the painting with Leon Bonder, the man who had referred him to the First National City Bank. According to Bonder, the defendant indicated a desire to sell the painting. Bonder mentioned the matter to his employer, who also happened to be an operative of the F.B.I. As a result, Bonder was introduced to F.B.I. agents, who prevailed upon him to introduce them to the defendant as visitors from Ohio who would be interested in purchasing the Pollock painting for as much as $100,000 (Tr. 1289-1293, 1308-1312).[8]

On February 12, 1974, F.B.I. Agents McShane (Tr. 715 et seq.) and Deenedy, visited the defendant's office with Bonder under the guise of being "Mr. and Mrs. Lane" from Akron, Ohio. Following preliminary negotiations, they returned later in the day with F.B.I. Agent Sangillo (Tr. 805 et seq.), who purported to be an art expert (Tr. 721). When the defendant showed them the painting, the bill of sale from Wertz, and an appraisal, they arrested him (Tr. 721).

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[8] The defendant's testimony with regard to this and subsequent events is set forth at Tr. 1045-1067.

On being questioned by the agents, and by an Assistant United States Attorney, the defendant revealed his course of dealings with the painting, the manner in which he had acquired it, the discussion with Hoffman, and Wertz's earlier attempt to foist a false bill of sale (See: Fn. 7, supra, p. 13) for the painting upon the defendant (Tr. 721-732).

D. The Course of Dealings Between Maxwell Galleries and Peter Wertz - Unknown to the Defendant.

We have reserved until last our treatment of Wertz's course of dealings with the Maxwell Galleries since those dealings were unknown to the defendant. We have recited, supra, at pp.11-13, the facts relating to when the defendant first acquired knowledge that the painting had not been paid for. According to Loughran, that information was transmitted on November 27 or 28. According to the appraiser, Richards (the actual source of the information), it could not have been before mid-December. According to the defendant, it was not until mid-January. There is no evidence in this case that the defendant knew any more than that until after he had been arrested. Thus, the facts which we are about to recite were unknown to the defendant throughout the period covered by the indictment.

In April, 1968, the Maxwell Art Galleries in San Francisco purchased, for a total of $50,000, "68 black and white, sepia, and colored drawings" by the artist Jackson Pollock (GX 5c-A. 237; A. 118-9).

In the beginning of June, 1973, Maxwell Galleries

commenced a telephone and letter dialogue with a New York art collector who identified himself as Peter Wertz (GX 7a-A. 238; A. 18-25).[9] On July 31, 1973, Maxwell Galleries offered one of the Pollock paintings, entitled "Crucifixion" (GX 1) to Wertz for $30,000 (GX 8-A. 239; A. 33). Thereafter, Wertz was also offered a painting entitled "Susanna" (GX 2) by the artist Thomas Hart Benton, for $25,000 (A. 35-6).

During the course of a telephone conversation, Wertz gave several references, including the Chelsea National Bank and the owner of a prominent New York art gallery. The Gallery checked with the Bank and received a good report. No effort was made to check the other references (A. 36-7, 123-4).

On or about August 11, 1973, Wertz accepted the Galleries' offers that he purchase the two paintings. He was requested to confirm his acceptance in writing, and he did so on that date (GX 9-A. 241; A. 35-6). His letter stated as follows:

> "I wish to confirm our telephone conversations concerning my purchase of the two paintings listed below:
>
> "1. Jackson Pollock, gouache, signed, 21 1/2 x 15 1/2 inches, framed. $30,000.
>
> "2. Thomas Hart Benton, oil on canvas, "Susanna," 26 x 18 inches, signed

[9] The owner of Maxwell Galleries, March Hoffman (A. 115 et seq.), and his assistant, Blanche Rubenstein (A. 16, et seq.), both testified as government witnesses. Their complete testimony is reproduced in the Appellant's Appendix. All of Wertz's dealings were with one or the other of these two individuals, but chiefly with Miss Rubenstein.

framed, with holograph letter of Benton regarding this painting. $25,000.00.

"I understand that I am to pay you in full for the Pollock within 30 days of its arrival here and the Benton 30 days after that. You may ship the Pollock or both if you wish. Kindly send via air express and crate well. I will bear the added cost." (GX 9-A. 241)

The Benton was sent to Wertz on September 6, 1973 and the Pollock was sent on September 13, 1973 (GX 10, 11-A. 242, 243; A. 42). On September 25, 1973, the Gallery billed Wertz for the paintings (GX 12-A. 244). On October 2, 1973, not yet having been paid for the first two paintings, the Gallery offered to sell Wertz a painting entitled "Madame Cordier, 1874" (GX 3), by the artist Marie Cassatt, for $45,000 (GX 13-A. 245). A few days later, Wertz called the Gallery and said he wanted the Cassatt (A. 50). They sent him the painting on October 9, 1973 (GX 14, 15-A. 246, 248; A. 47-53).

Following a pleasant correspondence with the Gallery unrelated to the above noted acquisitions (GX 16, 17-A. 249; 250), Wertz was billed for the Cassatt on October 31, 1973 (GX 18-A. 251).[10] Notwithstanding his continued failure to pay for any of the three paintings, the Galleries'

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[10] In the interim, during October, Maxwell Galleries was visited by Thomas Bayne, one of Wertz's employees, who was in California on vacation. Bayne told Miss Rubenstein that payment would be delayed due to the Salads of America venture, with which Miss Rubenstein was already familiar (A. 41, 207-8). Miss Rubenstein acknowledged that, during this meeting, Bayne gave her the card of Antique Investors and told her that he and Wertz were antique investors (A. 834).

The facts hereinafter recited post-date the November 2, 1973 transfer of the painting to the defendant by Wertz in payment of legal fees (supra, pp.9-11).

correspondence and billings to Wertz made clear that the sales had been consummated and that the paintings were his. (See: each of the Government Exhibits noted supra. See also: the Galleries' letter to Wertz dated November 25, 1973 (GX 20-A. 253), which refers to the "Marie Cassat you purchased", and to tne fact that Wertz was the "new owner" of the painting).

On November 30, 1973, Wertz was sent a monthly statement showing a balance due of $100,000. (GX 19-A. 252) On December 1, 1973, Thomas Bayne, an employee of Wertz, advised the Gallery that two checks of undescribed denominations had been placed in the mail (A. 129-131)

On December 3, 1973, the Gallery offered Wertz several other valuable paintings (GX 23-A. 256) and on December 6, 1973, they reminded him that a museum wished to show "your portrait of Mdme. Cordier, 1874" (GX 21-A. 254).

On December 7, 1973, the Gallery wrote to Wertz advising him that the two checks had not yet arrived (GX 24-A. 257). On December 10 or 11, two checks, for $45,000 each (GX 25 and 25a-A. 258) and a covering letter (GX 26-A. 260) were received from Wertz by special delivery, certified mail (GX 26a-A. 261). Wertz's letter explained that he had been ill, and that he was "still short" financially due to an investment in a Dominican Republic project wnich had been mentioned in prior correspondence and telephone conversations. The checks were post-dated, December 22, 1973 and January 15,

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[11] This mailing was the predicate for Count 2 of the indictment.

1973 [sic], respectively.

On December 12, 1973, the Gallery wrote to Wertz. That part of the letter which concerned the three paintings already purchased, stated as follows:

> "Received your two checks. One was post-dated for December 22, 1973 which we are holding on to, and the other January 15, 1973. Can you call us and let us know if that was meant to be January 15, 1974 instead? Could you send us another check with that date, and we will return this one to you; or one dated for this month would be very nice if it can be managed." (GX 27-A. 262)

On December 20, 1973, two days before the first check was due to be presented, the Gallery received the following telegram over the name of Thomas Bayne:

> "December 21 until December 30 Peter has had to take more capital to Dominican Republic but expects funds to arrive on or before that date I will call you to give details best wishes for the season" (GX 28-A. 263)

On December 22, 1973, the Gallery confirmed through its own bank that the first check would not clear Wertz's bank (A. 142-4).

As noted supra, Donald Richards, a Pittsburgh gallery owner and art appraiser had occasion to appraise Wertz's collection of paintings on December 11, 1973 (Tr. 881 et seq.). A few days thereafter, Richards contacted the Maxwell Galleries, apparently for the purpose of checking the background of the Benton painting. It was thus that the Gallery learned that Wertz was in the process of attempting to sell one or more of the paintings as to which payment had not yet been made (A. 134-5;

Tr. 890-1, 894-6). Nevertheless, the Gallery held off any action with the hope that the two post-dated checks would clear when they were submitted (A. 141). In the interim, the owner of the Gallery spoke to Howard Allbrite, the Pittsburgh dealer who had engaged Richards and who was in the process of negotiating to purchase Wertz's collection. During that conversation, Allbrite revealed that Wertz's true name was Harold Von Maker (A. 146).

On December 31, 1973, not having heard anything from Wertz, the Gallery sent him a telegram. The telegram, allegedly sent by Hoffman, was unavailable at trial, and Hoffman had not made any record of its contents. Hoffman's best recollection of the contents, which admittedly was "not word for word", was as follows: "I told him that I will be coming to New York to present two uncollectible checks or I want my paintings back." (A. 151-2). No response was received from Wertz. Indeed, there was no proof adduced that Wertz had ever actually received the telegram.

On January 14, 1974, Allbrite and Richards, who were then still negotiating with Wertz for the purchase of his collection, travelled to the Maxwell Gallery in California. Their trip had a twofold purpose. The first was for the purpose of acquiring paintings to stock a Pittsburgh gallery, and the second was to discuss with Hoffman the three paintings which had been purchased by Wertz (Tr. 891-2). On January 18, 1974, during the course of that visit to California, the Maxwell Galleries received the following telegram over the

name of Thomas Bayne:

> "Peter Wertz has been extremely sick for last two weeks with kidney stones. He has funds arriving Monday to cover entire account. Arrangements will be made then to transfer to you by bank draft." (GX 29-A. 264)

The above noted telegram apparently was the final straw for Hoffman. Since Allbrite was in town and was in the process of having direct dealings with Wertz with regard to the sale of the Antique art collection, Hoffman commissioned Allbrite to either secure payment or the return of the paintings. For this effort, Allbrite was to receive $15,000 (A. 180-1). A letter of authority was personally given by Hoffman to Allbrite for that purpose (GX 30-A. 265).

As noted supra, p.14, it was on January 21, 1974 that Hoffman learned that the defendant was the attorney for Antique and for Wertz, and contacted him.

E. The Defendant.

The defendant testified in his own behalf (Tr. 962 et seq.), and denied any criminal intent with respect to his involvement with the Jackson Pollock painting. Moreover, he attested to his good faith, his belief that he had received good title to the painting, and to his lack of knowledge with respect to any fraudulent representations that may have been made by Wertz to Maxwell Galleries. Moreover, as corroborated by the government witnesses Bayne and Loughran, he confirmed his understanding that the proceeds of the sale of the Antique collection would be utilized to pay Wertz's outstanding

financial obligations (Tr. 1067-71).

Several character witnesses testified to the defendant's excellent reputation in his community and within his profession (Irwin Miniberg, Tr. 394-6; Lawrence Sherman, Tr. 954-956; Robert J. Moss, Tr. 957-959; Myron Slosberg, Tr. 959-961; James P. McLoughlin, Tr. 974-977).[12]

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[12] Numerous extremely impressive letters were written to the trial judge, prior to sentence, with respect to the defendant's professional, social and familial reputation. Those letters have been docketed to this Court as part of the record on appeal.

ARGUMENT

Introduction to Argument

The four counts upon which the defendant was tried and convicted were each predicated upon the contention that the untried co-defendant, Harold Von Maker, also known as Peter Wertz, fraudulently secured title to the painting "Crucifixion" by the artist Jackson Pollock. We respectfully urge that, in reviewing the facts of this case, this Court bear in mind the following statement of the allegedly fraudulent conduct by Wertz, as contained in the Court's charge to the jury:

> "The government contends that Von Maker used a false name, Peter Wertz, in order to conceal his criminal history and adverse financial circumstances; that Von Maker falsely indicated that he would use the Jackson Pollock and two other paintings to round out his personal collection of American paintings, whereas he intended to have them sold or pledged to raise money for certain business ventures; that Von Maker promised to pay Maxwell Galleries for the Jackson Pollock within thirty days of its delivery, which would have made payment due about mid-October, 1973, and promised to pay for the other two paintings on an agreed schedule, whereas Von Maker had no intention of paying for the paintings until long after the scheduled date, if at all.
>
> "The government furtner contends that during the months after the paintings had been delivered Von Maker, assisted by others, made false assurances to Maxwell about payments being forthcoming in order to stall Maxwell in efforts to recover the paintings." (Tr. 1443-4)

It is our contention that the course of conduct between Wertz and Maxwell Galleries did not constitute criminal fraud. Even more important, it is our contention that the

government failed to adduce any proof that the defendant knew that Wertz had engaged in a course of materially fraudulent conduct in securing title to the Pollock painting. If that is so, the defendant's conviction as to each of the four counts of the indictment is not supported by the evidence, and should be reversed, and the indictment should be dismissed as against him.

POINT I

THE COURSE OF DEALINGS BETWEEN WERTZ AND MAXWELL GALLERIES DID NOT CONSTITUTE FRAUD WITHIN THE MEANING OF 18 U.S.C. § 1341, NOR DID IT CONSTITUTE UNLAWFUL CONVERSION WITHIN THE MEANING OF 18 U.S.C. § 2315.

In this case, the government sought to convert a civil contract action, between Maxwell Galleries and Peter Wertz, into a criminal proceeding.

During the course of his testimony, Hoffman, the owner of Maxwell Galleries, sought to give the impression that when the Pollock painting was shipped to Wertz, it was not intended that Wertz receive title to the painting until payment was received. Indeed, the mail fraud counts of the indictment charged that Wertz "would and did obtain on consignment from the Maxwell Galleries" the painting in question.

On the contrary, as shown by our analysis of the course of dealings between the Gallery and Wertz, supra, pp. 17-23, it is clear beyond doubt that the Gallery intended to and did make a final sale of the painting to Wertz. Thus,

during the course of the trial and after all of the relevant evidence had been received, the Court noted:

> "I'll tell you what, I know I'm anticipating here, but what you are addressing yourself now to is whether this transaction of Maxwell Galleries was a sale or whether it was a delivery on approval or a consignment.
>
> "Now, let me say to you that if that were the issue in this case, to the extent that is an issue rather, I think you [the defense] have the better of it. If the whole case depended on that, I have very serious doubts of whether I would ever let it go to the jury.***"
> (Tr. 821)

Similarly, the Court charged the jury:

> "***I instruct you that the government's case does not depend on whether or not you specifically find that the paintings were received on consignment. It is sufficient for the government to prove beyond a reasonable doubt that there was a scheme to obtain the paintings by any formality by the use of fraudulent representations or promises."
> (Tr. 1457)

We do not have, therefore, a situation where Wertz or the defendant improperly utilized or disposed of property which was owned by Maxwell Galleries. The issue, therefore, is whether the government failed to prove that Wertz's dealings in securing title to the painting from the Maxwell Galleries amounted to criminal fraud within the meaning of the mail fraud statute, 18 U.S.C. § 1341. In the absence of such legally sufficient proof, the defendant Schwartz could not properly have been found guilty of aiding and abetting the alleged mail fraud (Counts 1 and 2). Moreover, since the alleged criminal fraud under Counts 2 and 3

was also the predicate for the unlawful conversion (18 U.S.C. § 2315) charged in Counts 9 and 10, the failure to prove criminal fraud also constitutes a failure of proof as to those counts. The Court made that issue clear in its charge to the jury:

> "With respect to the second element of each of these counts, you must find in order to convict that the government has proved beyond a reasonable doubt that the painting was unlawfully converted or taken. I charge you that these words in the statute are not limited to situations of physical theft. The statute is applicable to any situation where a person dishonestly obtains goods belonging to another with the intent to deprive the owner of the full rights and benefits of that ownership.
>
> "I charge you that if you find that Von Maker obtained the Pollock painting from Maxwell Galleries by fraud, sufficient for the purposes of the mail fraud statute, that is enough to constitute an unlawful taking for the purpose of Counts 9 and 10." (Tr. 1467)

We turn, then, to the facts of the case. The testimony shows that Wertz utilized a false name in his dealings with Maxwell Galleries. There is no indication whatsoever that the use of his true name would have deterred Maxwell Galleries from doing business with him. Moreover, as far as the evidence shows, the only way in which Maxwell Galleries could have ascertained anything about Wertz's financial circumstances was by reference to the name he gave them. All his bank records were in that name, and it is by that name that he was identified as being the principal of Antique Investors, Inc. Moreover, Wertz gave several business references to Maxwell Galleries, including his bank and a prominent New York art dealer. The banking reference was excellent and Maxwell Galleries declined

to check out the remaining references.

According to the testimony Wertz, in purchasing the Pollock painting, indicated that he was seeking "to round out" his personal collection. The fact of the matter is that there was no evidence, whatsoever, that Wertz had a contrary intention. Several months later, when being pressed for payment by Maxwell Galleries and others, Wertz did seek to pledge or sell the paintings in question. That is hardly inconsistent with the rights of ownership and is not indicative of the lack of a prior intent to keep the paintings.[13]

It is true, based upon the testiomny and the documentary evidence (See: GX 9), that Wertz agreed to pay for the Pollock painting within thirty days after its receipt by him. There is, similarly, no evidence that Wertz did not have such an intention. It is also true that Wertz was pressed for cash, but that, through his corporation, he possessed a very substantial equity in the Jackie Gleason estate and an interest in valueable works of art. As payment for the paintings became due, Wertz was in the process of attempting to liquidate that collection for $3.5 million. The testimony is clear that he consistently expressed the intention to others, who had no interest in the Maxwell claim, that he intended to use the proceeds from that sale to pay the accumulated debts.

---

[13] Wertz's offer to sell various paintings to the Gallery and Hoffman's offer to sell items for Wertz readily dispels any claim that the Gallery personnel believed Wertz was not inclined to sell portions of his collection.

A consideration of the course of dealings, taken as a whole, cannot omit mention of the failure of Maxwell Galleries to press its claim for payment until December, 1973. As late as December 3, 1973, the Gallery offered, in writing, to sell Wertz several other valuable paintings (GX 23). When, on December 10 or 11 post-dated checks were received from Wertz, no complaint was made with respect to his obvious intention to defer payment. This establishes that timely payment was not considered to be of the essence. Thus, even if, at the outset Wertz "concealed" a likelihood of delayed payment, this could not have constituted a material misrepresentation amounting to fraud. If it was not considered such by the seller, only a perverted logic would, nonetheless elevate it to the status of a criminal offense.

What we have, then, is the disappointed expectation of a creditor. It can be concluded, based upon the testimony, that Wertz gave the appearance of being a wealthy man. An examination of the correspondence from the Gallery to Wertz and of the testimony of the Gallery employee who dealt with Wertz, Blanche Rubenstein, reveals that her impressions in this regard were exacerbated by her own speculations rather than by what was said to her by Wertz. Moreover, there is no claim that he ever represented that his immediate ready cash position was sufficient to pay for the painting.

As was stated in United States v. Regent Office Supply Co., 421 F. 2d 1174 (2d Cir., 1970):

"It is generally stated that there

> are two elements to the offense of mail fraud: use of the mails and a scheme to defraud. Since only a 'scheme to defraud' and not actual fraud is required for conviction, we have said that 'it is not essential that the government allege or prove that purchasers were in fact defrauded.' [Citation omitted] But this does not mean that the government can escape the burden of showing that some actual harm or injury was contemplated by the schemer.***"
> [Emphasis in original]

The facts of the present case show that Wertz was at most, guilty of puffing not amounted to the false pretenses necessary for a finding of criminal conduct. United States v. Regent Office Supply Co., supra, 421 F. 2d at 1179. Indeed, even if Wertz's conduct amounted to a mere civil fraud, this Court's statement in United States v. Dougherty, 468 F. 2d 989, 995 (2d Cir., 1972), would be applicable:

> "[W]e are by no means convinced that, when Congress speaks of intent to defraud in a criminal statute, it means merely the attitude of mind that would support a civil action. Compare the discussion of the meaning of 'wilfull' in United States v. Murdoch, 290 U.S. 389, 394-395 (1933); Spies v. United States, 317 U.S. 292, 297-298 (1943); and Screws v. United States, 325 U.S. 91 (1945).***"

Since the government failed to establish criminal fraud or resultant unlawful conversion on the part of Wertz, the defendant could not be guilty of those crimes. That being so, the defendant's conviction should be reveresed as to each of the four counts.

POINT II

THE GOVERNMENT FAILED TO ESTABLISH THAT THE DEFENDANT, AT ANY TIME, POSSESSED SUFFICIENT KNOWLEDGE OF WERTZ'S COURSE OF DEALINGS WITH MAXWELL GALLERIES TO MAKE HIM A PARTY TO THE ALLEGEDLY FRAUDULENT SCHEME. IN ANY EVENT, THE FEW FACTS WHICH WERE EVENTUALLY CALLED TO THE DEFENDANT'S KNOWLEDGE WERE NOT MADE KNOWN TO HIM UNTIL AFTER HE HAD SECURED TITLE TO THE PAINTING. UNDER THOSE CIRCUMSTANCES, EVEN UNDER PRINCIPLES OF CIVIL LAW HE WAS NOT OBLIGATED TO RETURN THE PAINTING TO MAXWELL GALLERIES.

We have set forth, supra, at pp. 9 - 17, the defendant's course of dealings and acquisition of knowledge with respect to a Pollock painting. There is absolutely no evidence, direct or circumstantial, that the defendant had any role in the acquisition of the painting or that he had any knowledge concerning even the existence of this painting prior to its tender to him by Wertz in mid-October, 1973. According to the government witness Loughran, the defendant first learned on November 26 or 27 that the painting had been acquired from Maxwell Galleries and had not been paid for. Loughran's testimony, in that regard, was conclusively disproved by the defendant witness Richards who, concededly, was the first to obtain this information and did not do so until a few days after December 11, 1973. The defendant testified that Loughran did not so advise him until mid-January, 1974. Whichever version is accurate, the defendant knew nothing about Maxwell Galleries or about the non-payment at the time he, himself, acquired title to the painting on November 2, 1973.

Then, on January 21 and 24, 1974, when the defendant spoke with the Gallery owner, Hoffman, first on the telephone and then in person, he learned nothing more. Hoffman asserted a claim to the painting, based only upon the fact that he had not been paid for it. There is no evidence that Hoffman revealed to the defendant any fraudulent misrepresentations Wertz may have made to Maxwell Galleries.

The jury, however, had before it, from the outset of the trial, the substance of the dealings between Maxwell Galleries and Wertz, unknown to the defendant at the time of his participation in the facts of this case. Thus, the following often-cited excerpt from the concurring opinion of Mr. Justice Jackson in Krulewitch v. United States, 336 U.S. 440 (1949), is quite applicable:

> "When the trial starts, the accused feels the full impact of the conspiracy strategy. Strictly, the prosecution should first establish prima facie the conspiracy and identify the conspirators, after which the evidence and acts and declarations of each in the course of its execution are admissible. As a practical matter, the accused often is confronted with a hodgepodge of acts and statements by others which he may never have authorized or intended or even known about, but which helped to persuade the jury of the existence of the conspiracy itself. In other words, a conspiracy often is proved by evidence that is admissible only upon the assumption that the conspiracy existed.***
>
> "A co-defendant in a conspiracy trial occupies an uneasy seat. There generally will be evidence of wrongdoing by somebody. It is difficult for the individual to make his own case stand on its own merits." (336 U.S. at 353-4).

The millstone of the independent conduct of Wertz was cast upon the defendant Schwartz. It is clear upon the facts of this case, as discussed supra, that the government did not rely upon evidence showing Schwartz's activities and knowledge, but rather upon the sheerest speculation, unsupported by evidence, that the defendant had some knowledge of Wertz's fraudulent course of dealings with Maxwell Galleries. The government's case is grounded upon nothing more than the dreaded concept of guilt by association. The difficulty of the defense, in this regard, was compounded by the fact that there was much testimony concerning the wrongdoing of others, such as Loughran, and such as the prior criminal record of Wertz, that was not even related to the facts of this case.

In Ingram v. United States, 360 U.S. 672 (1959), the Court reaffirmed the proposition that:

> "Without knowledge, the intent cannot exist. ***Furthermore to establish an intent, the evidence of knowledge must be clear not equivocal. ***This because charges of conspiracy are not to be made out by piling inference upon inference, thus fashioning *** a dragnet to draw in all substantive crimes." (360 U.S. at 680).

As was stated by the Court in Scales v. United States, 367 U.S. 203, 224 (1961), "in our jurisprudence guilt is personal...."

In United States v. Kates, 508 F. 2d 208 (3d Cir., 1975), the Court held:

> "It is imperative, however, that we keep in mind the essential nature of what a conspiracy is in general and what this particular conspiracy was proven to

be. It is well established that the 'jist' of a conspiracy is an agreement. However slight or circumstantial the evidence may be, it must, in order to be sufficient to warrant affirmance, tend to prove that the appellant entered into some form of agreement, formal or informal, with his alleged conspirators. Similarly, we have stated that the essence of a conspiracy is a 'unity of purpose' or 'common design.' We must also find in this case that [the appellant] knowingly entered into the conspiracy and that he had the specific intent to defraud.... As the Court of Appeals for the Ninth Circuit stated in reversing a conspiracy conviction under this same statute, 'we must be ever mindful that the requisite mental state in a prosecution for fraud is a specific intent to defraud and not merely knowledge of shadowy dealings'. United States v. Piepgrass, 425 F. 2d 194, 199 (9th Cir., 1970)." 508 F. 2d at 310-311)

The United States Court of Appeals for the Sixth Circuit has stated the same principle in a different way:

"Under our system of justice it is not enough that evidence in a criminal case might support a finding of unethical conduct or of some violation of some law. It is essential that there be evidence from which a jury could have found the defendant guilty beyond reasonable doubt of the particular offense against the federal criminal law with which the defendant has been charged." (United States v. Sworthout, 420 F. 2d 831, 833 (6th Cir., 1970).

In determining whether the evidence is sufficient to withstand a motion for judgment of acquittal, the proper test is that which was announced by Judge Prettyman in Curley v. United States, 160 F. 2d 229 (D.C. Cir., 1947):

"The functions of the jury include the determination of the credibility of witnesses, the weighing of the evidence, and the drawing of justifiable inferences of fact from proven facts. It is the function of the judge to deny the jury any opportunity

> to operate beyond its province. The jury may not be permitted to conjecture merely, or to conclude upon pure speculation or from passion, prejudice or sympathy. The critical point in this boundary is the existence or non-existence of reasonable doubt as to guilt. If the evidence is such that reasonable jurymen must necessarily have such a doubt, the judge must require acquittal, because no other result is permissible within the fixed bounds of jury consideration. But if a reasonable mind might fairly have a reasonable doubt or might fairly not have one, the case is for the jury, and the decision is for the jurors to make.***
>
> "The true rule, therefore, is that a trial judge, in passing upon a motion for directed verdict of acquittal, must determine whether upon the evidence, giving full play to the right of the jury to determine credibility, weigh the evidence, and draw justifiable inferences of fact, a reasonable mind might fairly conclude guilt beyond a reaonsable doubt. If he concludes that upon the evidence there must be such a doubt in a reasonable mind, he must grant the motion; or to state it another way, if there is no evidence upon which a reasonable mind might fairly conclude guilt beyond a reasonable doubt, the motion must be granted. If he concludes that either of the two results, a reasonable doubt or no reasonable doubt, is fairly possible, he must let the jury decide the matter." 160 F. 2d at 232-233). [Emphasis added]

To the same effect see: United States v. Taylor, 464 F. 2d 640 (2d Cir., 1972); Wright, Federal Practice and Procedure, § 467; Orfield, Criminal Procedure Under the Federal Rules, § 29:18; Moore's Federal Practice, Vol. 8, § 29.06 [Cipes ed.]

We respectfully submit, that the defendant's mere late-acquired knowledge with respect to the mere fact that Wertz had not paid for the painting, did not constitute

sufficient evidence of knowledge or specific criminal intent to create a prima facie case as against the defendant with respect to each of the four charges of the indictment. Moreover, the defendant's knowledge that Wertz was in the process of liquidating Antique's $3.5 million art collection and intended to use its proceeds for the purpose of paying his debts, reinforces the conclusion that the defendant was absolutely devoid of criminal intent.

Our contentions in this regard squarely conform to the reversals of judgments of convictions against attorneys in United States v. Browne, 225 F. 2d 751 (7th Cir., 1955), at 757-759 and Milam v. United States, 322 F. 2d 104 (5th Cir., 1963) at 106-108.

* * *

Assuming arguendo that the facts made known to the defendant after he received title and possession of the painting revealed some prior fraud on the part of Wertz with respect to the procurement of the painting, then civil principles applicable to sales under these circumstances gave the defendant good title and he was not required to surrender the painting. This is made clear by the New York enactment of the Uniform Commercial Code.[14]

U.C.C. § 2-702 provides, in pertinent part, as follows with regard to the "seller's [Maxwell Galleries']

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[14] The provisions of the New York Uniform Commercial Code upon which we rely are set forth in the appendix annexed to this brief, at 2a-4a.

remedies on discovery of buyer's [Wertz's] insolvency":

" * * *

> "(2) Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing within three months before delivery the ten day limitation does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.
>
> "(3) The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser under this Article (Section 2-403). Successful reclaimation of goods excludes all other remedies with respect to them." [Emphasis added]

It is clear, therefore, that even if Wertz fraudulently misrepresented either his solvency or his intent to pay, then Wertz's title to the painting was voidable only as against Wertz. If the defendant Schwartz was a "good faith purchaser", then he received good title which could not be attacked by Maxwell Galleries.

Our contention in this regard is further enforced by U.C.C. § 2-403 which provides that a purchaser (Wertz) has power to transfer good title, "even though":

> "(a) the tranferor [Maxwell Galleries] was deceived as to the identity of the purchaser, or
>
> * * *
>
> "(d) the delivery was procured through fraud punishable as larcenous under the

criminal law."

U.C.C. § 1-201 (19) defines "good faith" as being "honesty in fact in the conduct or transaction concerned." U.C.C. § 1-201 (44)(b) includes within the definition of "value" the "total or partial satisfaction of a pre-existing claim".

It can thus be seen, that, as of the date when the defendant acquired title to the painting (November 2, 1973), at a point when he had no knowledge whatsoever concerning the transaction with Maxwell Galleries, he satisfied the requirements of being "in good faith" and a buyer for "value". Under U.C.C. §§ 2-702(3) and 2-403, he secured title to the painting superior to any rights previously held by Maxwell Galleries.

See also: Ross v. Leuci, 194 Misc. 345, 85 N.Y.S. 2d 497 (City Court of New York, 1949); Stanton Motor Corp. v. Rosetti, 11 A.D. 2d 296, 203 N.Y.S. 2d 273 (3rd Dept., 1960).

Moreover, in the present case, Maxwell Galleries did not retain any security interest in the painting nor did it act with expedition when Wertz failed to make timely payment. In short, from all outward appearances, Wertz was fully entitled to dispose of the painting as he wished.

It is respectfully submitted that, under all of these circumstances, the government failed to establish that the defendant Schwartz was a party to any criminal fraud or criminal conversion. His conviction as to each of the four counts should be reversed.

Conclusion

For all of the above reasons, the judgment of conviction should be reversed and the indictment should be dismissed.

Respectfully submitted,

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Martin Schwartz

Henry J. Boitel,
of Counsel

August 15, 1975

APPENDIX A

Statutes Involved

18 U.S.C. § 1341 - Frauds and Swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1000 or imprisoned not more than five years, or both.
As amended May 24, 1949, c. 139, § 34, 63 Stat. 94; Aug. 12, 1970, Pub.L. 91-375, §6(j) (11), 84 Stat. 778

18 U.S.C. § 2315 - Sale or receipt of stolen goods, securities, moneys, or fraudulent State tax stamps

Whoever receives, conceals, stores, barters, sells or disposes of any goods, wares, or merchandise, securities, or money of the value of $5000 or more, or pledges or accepts as security for a loan any goods, wares, or merchandise, or securities, of the value of $500 or more, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been stolen, unlawfully converted, or taken; or

Whoever receives, conceals, stores, barters, sells, or disposes of any falsely made, forged, altered, or counterfeited securities or tax stamps, or pledges or accepts as security for a loan any falsely made, forged, altered, or counterfeited securities or tax stamps, moving as, or which are a part of, or which constitute interstate or foreign commerce, knowing the same to have been so falsely made, forged, altered, or counterfeited; or

Whoever receives in interstate or foreign commerce, or conceals, stores, barters, sells, or disposes of, any tool, implement, or thing used or intended to be used in falsely making, forging, altering, or counterfeiting any security or tax stamp, or any part thereof, moving as, or which is a part of, or which constitutes interstate or foreign commerce, knowing that the same is fitted to be used, or has been used, in falsely making, forging, altering, or counterfeiting any security or tax stamp, or any part thereof--

Shall be fined not more than $10,000 or imprisoned not more than ten years, or both.

This section shall not apply to any falsely made, forged, altered, counterfeited, or spurious representation of an obligation or other security of the United States or of an obligation, bond, certificate, security, treasury note, bill, promise to pay, or bank note, issued by any foreign government or by a bank or corporation of any foreign country. As amended Oct. 4, 1961, Pub.L. 87-371, §3, 75 Stat. 802.

New York Uniform Commercial Code - § 1-201 - General Definitions

Subject to additional definitions contained in the subsequent Articles of this Act which are applicable to specific Articles or Parts thereof, and unless the context otherwise requires, in this Act:

* * *

(19) "Good faith" means honesty in fact in the conduct or transaction concerned.

* * *

(44) "Value". Except as otherwise provided with respect to negotiable instruments and bank collections (Section 3-303, 4-208 and 4-209) a person gives "value" for rights if he acquires them

(a) in return for a binding commitment to extend credit or for the extension of immediately available credit whether or not drawn upon and whether or not a charge-back is provided for in the event of difficulties in collection; or
(b) as security for or in total or partial satisfaction of a pre-existing claim; or
(c) by accepting delivery pursuant to a

pre-existing contract for purchase; or

(d) generally, in return for any consideration sufficient to support a simple contract.

New York Uniform Commercial Code - § 2-403 - Power to Transfer; Good Faith Purchase of Goods; "Entrusting"

(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

(a) the transferor was deceived as to the identity of the purchaser, or

(b) the delivery was in exchange for a check which is later dishonored, or

(c) it was agreed that the transaction was to be a "cash sale", or

(d) the delivery was procured through fraud punishable as larcenous under the criminal law.

(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

(3) "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods has been such as to be larcenous under the criminal law.

(4) The rights of other purchasers of goods and of lien creditors are governed by the Articles on Secured Transactions (Article 9), Bulk Transfers (Article 6) and Documents of Title (Article 7). L.1962, c.553, eff.Sept. 27, 1964.

New York Uniform Commercial Code - § 2-702 - Seller's Remedies on Discovery of Buyer's Insolvency

(1) Where the seller discovers the buyer to be insolvent he may refuse delivery except for cash including

payment for all goods theretofore delivered under the contract, and stop delivery under this Article (Section 2-705).

(2) Where the seller discovers that the buyer has received goods on credit while insolvent he may reclaim the goods upon demand made within ten days after the receipt, but if misrepresentation of solvency has been made to the particular seller in writing three months before delivery the ten day limitation does not apply. Except as provided in this subsection the seller may not base a right to reclaim goods on the buyer's fraudulent or innocent misrepresentation of solvency or of intent to pay.

(3) The seller's right to reclaim under subsection (2) is subject to the rights of a buyer in ordinary course or other good faith purchaser under this Article (Section 2-403). Successful reclamation of goods excludes all other remedies with respect to them. L.1962, c.553, eff.Sept. 27, 1964.

John A. Gordan, III
by: M. Rothenberg, Secy.
8/18/75